

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KEVIN A. GARY,

Petitioner,

Civil Action No. 07-CV-12010

vs.

HON. BERNARD A. FRIEDMAN

SHIRLEE A. HARRY,

Respondent.

ORDER ACCEPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

This matter is presently before the court on petitioner's objections [docket entry 36] to Magistrate Judge Komives' Report and Recommendation, which recommends the denial of petitioner's application for a writ of habeas corpus, and on petitioner's "motion to take judicial notice" [docket entry 33].

Despite the fact petitioner tendered a nolo contendere plea to the charges in this case (aggravated stalking), his habeas application is based largely on a claim of innocence. The magistrate judge has rejected petitioner's claims that his plea was involuntary, that he is innocent and should have been permitted to withdraw his plea, that his arrest was unlawful, that the prosecutor suppressed favorable evidence, that his conviction constituted double jeopardy, and that his trial attorney was ineffective. Although respondent argues that petitioner's claims have been procedurally defaulted, the magistrate judge elected to address the claims on the merits. Petitioner's objections, while numerous, are unpersuasive.

In his objections, petitioner suggests a number of actions he believes his lawyer could have taken on his behalf. However, petitioner fails to show how these actions would have affected his decision regarding his plea. Petitioner's burden is to "show there is a reasonable probability that

the result of the proceeding would have been different" had his attorney taken those actions. *Garrison v. Elo*, 156 F. Supp.2d 815, 829 (E.D. Mich. 2001). Petitioner's claim of innocence is based on his belief that the violation of a personal protection order is grounds for an aggravated stalking charge, while the violation of a mutual restraining order is not. The law petitioner cites does not support this argument. Petitioner's other objections, regarding his plea, prosecutorial misconduct, unlawful arrest, and double jeopardy, are similarly without substance. Accordingly,

IT IS ORDERED that petitioner's objections [docket entry 36] are overruled and Magistrate Judge Komives' Report and Recommendation is accepted and adopted as the findings and conclusions of the court.

IT IS FURTHER ORDERED that petitioner's application for a writ of habeas corpus is denied.

IT IS FURTHER ORDERED that petitioner's motion to take judicial notice [docket entry 33] is denied.

IT IS FURTHER ORDERED that petitioner's motion for reconsideration [docket entry 34] is denied.

DATED: July 12, 2010

s/Bernard A. Friedman
BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record via the Court's ECF System to their respective email addresses or First Class U.S. mail disclosed on the Notice of Electronic Filing on July 12, 2010.

s/Deborah J. Goltz for Carol Mullins
Case Manager
313/234-5172